SUPREME COURT, U.S.

Supreme Court, U.S.
JUL 23 1971
E. ROBERT SEAVER, CLERK

Supreme Court of the United States

OCTOBER TERM, 1971

71-120

EUGENE SAMMON,

Respondent,

v.

CENTRAL GULF STEAMSHIP CORPORATION,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WALTER A. DARBY, JR.,
Counsel for Petitioner,
26 Broadway,
New York, N. Y. 10004.

INDEX

	PAGE
Opinions of the Courts Below	2
Jurisdiction	2
Questions Presented for Review	2
Statutes Involved	3
Statement of the Case	3
Reasons for Allowance of the Writ	5
Conclusion	8
Appendix (Opinions of the District Court and Circuit Court)	9

Table of Cases

Ahmed v. United States, 177 F. 2d 898 (2d Cir. 1949)	6
Commissioner v. Duberstein, 363 U. S. 278	7
McCorpen v. Central Gulf Steamship Corporation, 396 F. 2d 547 (5th Cir.); cert. denied 393 U. S. 894 (1968)	3, 5
Montana v. Kennedy, 366 U. S. 308	7
Thompson v. City of Louisville, 362 U. S. 199	7
U. S. v. U. S. Gypsum, 333 U. S. 364	7

MISCELLANEOUS

PAGE

Black's Law Dictionary 5

STATUTES CITED

28 U.S.C. § 1254(1) 2

§ 2101(c) 2

Supreme Court of the United States

OCTOBER TERM, 1971

EUGENE SAMMON,

Respondent,

v.

CENTRAL GULF STEAMSHIP CORPORATION,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Central Gulf Steamship Corporation, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on April 26, 1971, which judgment reversed that of the District Court for the Southern District of New York. The District Court, sitting without a jury, had entered judgment in favor of the defendant and dismissed plaintiff-seaman's claim for maintenance and cure.

The Opinions of the Courts Below

The opinions of the District Court for the Southern District of New York and of the Court of Appeals for the Second Circuit are printed in the Appendix hereto. The District Court opinion is reported at 305 F. Supp. 1071. The Court of Appeals' opinion is not yet reported.

Jurisdiction

The decree of the Court of Appeals for the Second Circuit was entered on April 26, 1970.

The action was brought by libel and complaint filed by the seaman and is within the Admiralty and Maritime jurisdiction of the United States.

The jurisdiction of this Court to review, by way of Writ of Certiorari, the decree complained of its conferred by 28 U.S.C. Sections 1254 (1) and 2101 (c).

Questions Presented for Review

1. Whether a Seaman, who, on stipulated and uncontested facts, was found by the trier of facts to have "willfully" concealed a chronic, recurrent and known disabling condition from his employer-shipowner during a pre-sign on physical examination, may recover maintenance and cure when disabled by the concealed illness which did, in fact, recur.

2. Whether the existence of diametrically opposed Circuit Court decisions, creating contradictory rules governing a shipowner's responsibility to pay maintenance and cure benefits does destroy the required uniformity of the Maritime Law and places intolerable and imposible burdens on shipowners, so creating a gross miscarriage of justice.

3. Whether a shipowner, who, in conformity with the Federal Maritime Law governing maintenance and cure benefits, as enunciated by the Circuit Court of its domicile, and as was apparently followed in all other Circuits at the time in question, determined that maintenance benefits were not owing, can be held to have acted arbitrarily and willfully for not anticipating that the Court of Appeals

for the Second Circuit would depart from the accepted rule and create a conflict between the Federal Circuits, and, as a result, be made responsible for the plaintiff's attorneys' fees.

Statutes Involved

A seaman's right to maintenance and cure from his shipowner-employer is based upon the General Maritime Law, as enunciated by the Federal Courts and does not rest upon any statute.

Statement of the Case

The plaintiff seaman commenced a non-jury action in the United States District Court for the Southern District of New York, seeking to recover maintenance and cure benefits from his employer, the owner of the S/S Green Port, Central Gulf Steamship Corporation. The defendant, Central Gulf, refused to honor the claim for maintenance, relying upon the Maritime Rule, as then stated in the unanimously accepted rule of *McCorpen* v. *Central Gulf Steamship Corporation,* 396 F. 2d 547 (5th Cir.); cert. denied 393 U. S. 894 (1968). It should be noted that the defendant in this case and in *McCorpen* is the same steamship company and therefore its refusal to pay maintenance benefits in the present case was far from arbitrary, but was done in reliance upon a rule of law enunciated in the prior case in which it had participated.

The District Court, having heard the evidence, found that the following facts were either undisputed or stipulated: that the seaman knew he had a chronic and spontaneously recurrent plantar wart condition; that, when this condition recurred, he could not perform his duties properly; that he had an obligation to reveal his past medical history to his potential employer; and that he con-

cealed the history of his plantar wart condition. In denying the seaman maintenance, the court found these facts to amount to "a willful failure to disclose a condition material to his ability to perform his duties as an able-bodied seaman."

The Court of Appeals, in reversing, agreed with the District Court that concealment of a previous condition would bar maintenance if the seaman knew the condition was "relevant".

On the stipulated facts of this case, plaintiff knew or should have known that the information he suppressed was relevant and, therefore he should not be allowed maintenance benefits.

But the 2nd Circuit attempted to distinguish the present case, and said:

> "The rule of the McCorpen case, that any concealment of material medical data, prevents an award for maintenance and cure, is not the rule of this Circuit. In *Ahmed* v. *United States,* 177 F. 2d 898, 900 (2d Cir. 1949) this Court held that a seaman 'who believes himself fit for duty and signs on without any fraudulent concealment, is entitled to maintenance and cure, notwithstanding a previous condition of ill health.' The concealment is fraudulent only if the seaman knows or reasonably should know that the concealed condition is relevant."

The Court said Sammon in their judgment, acted honestly (which apparently means without a sinful or immoral intent), and therefore they would award maintenance. The affront of such substitution of appellate opinion works on the "clearly erroneous" rule is discussed below.

It is proper to note here the latently pernicious effect in this apparent distinction.

Concealment has an accepted legal meaning, uniformly held as "the designed and intentional withholding of any

material fact." (See: Black Law Dictionary.) Therefore unless the further requirement of fraud, as added by the 2nd Circuit is to be more than a tautology, it must connote more than "wilfulness." As shown by the Court's examining the character of plaintiff's conduct as "honest", it is clear that the idea of "fraud" relates to the subjective area of "why" the plaintiff acted rather than the "how".

It is suggested that this new rule, created by the Second Circuit is internally illogical, inequitable to this defendant and to shipowners generally, and completely unrealistic and incapable of practical application. It is also contrary to the weight of the established maritime law.

Reasons for Allowance of the Writ

The decision of the Court of Appeals for the Second Circuit creates a new criteria for determining whether maintenance benefits are due and owing to seamen and creates an extraordinary and intolerable burden on shipowners, and this new rule is, by its terms, in clear conflict with the formerly universal rule of *McCorpen* v. *Central Gulf, supra.*

In addition to the conflict thus created, the rule of the Second Circuit is completely unacceptable and inequitable.

The rule of *McCorpen* was to the effect that if a seaman knowingly and therefore willfully concealed relevant medical material, he was barred from collecting maintenance benefits if he is subsequently disabled because of a condition growing out of the concealed condition. It is no excuse for the seaman to claim that, in his judgment, the matter he concealed was not important. The Second Circuit, however, has now stated that the concealment will be a bar only if the seaman, in his judgment, felt that the matter he was concealing was relevant. It is suggested that this rule which leaves the decision to disclose or not to disclose prior medical history completely in the subjective discre-

tion of a seaman is unrealistic and unworkable. The seaman by neither training nor temperament has the qualifications to judge what medical data is important to his prospective employer. Such a rule is an invitation to fraud since seamen will be tempted if not invited, to label all concealment as innocent, or due to an honest mistake on their part. A determination of whether a willful concealment was "honest" is not the proper stuff for courts of law, but lies, if anywhere, in the province of moral theologians and confessors.

The District Court stated what has to be the only criterion when it said:

> "The test in this case is not merely whether the seaman reasonably expected that his prior condition was one of importance to the shipowner, that is, whether he felt he could reasonably perform his duties. Rather it is that the seaman should provide truthful and complete answers to questions concerning his medical background to give his potential employer an opportunity to study his history and make a judgment as to whether or not he should employ him. The concealment of material medical data prevents entitlement to an award of maintenance and cure for this condition since the causal link to the existing disability is present. No valid contract for employment existed between the parties for this voyage."

In addition, the Second Circuit cited as authority for their rule, the case of *Ahmed* v. *United States*, 177 F. 2nd 898 (2nd Circuit, 1949), as prior support for the rule they were then enunciating. However, in *Ahmed*, there was as a matter of fact, a finding that there was no concealment since an almost impenetrable language barrier existed between the seaman and the shipowner. Any failure on the part of the seaman, Ahmed, to disclose, was due to an in-

ability to communicate and there was therefore no possibility for the question of willful concealment to even arise. As disclosed by the record in the proceedings for certiorari in *McCorpen*, the *Ahmed* case had uniformly been treated as a case where there was no concealment, rather than a case justifying concealment.

The Second Circuit in overruling the District Court, concluded, contrary to the findings of fact below, that there was no evidence to sustain that the plaintiff deliberately suppressed anything relevant. Such a finding is plainly contrary to the undisputed and stipulated facts established in the District Court. The Circuit Court, under the Federal Rules and decisions of Appellate Procedure, had no power to simply substitute their opinions or feelings for that of the Trial Judge where there was clearly no showing that the findings of the Trial Judge were in any way clearly erroneous.

> *Commissioner* v. *Duberstein*, 363 U. S. 278, 291;
> *U. S.* v. *U. S. Gypsum*, 333 U. S. 364, 395.

Furthermore, the action of the Second Circuit in labeling the conduct of Central Gulf as arbitrary because it failed to anticipate that the Second Circuit would soon create a new rule, is unduly harsh, inequitable and a gross miscarriage of justice. Such conduct in and of itself has been held to be a sufficient mandate for this court to grant its writ of certiorari. *Thompson* v. *City of Louisville*, 362 U. S. 199; *Montana* v. *Kennedy*, 366 U. S. 308.

It is further submitted that the decision of the Second Circuit which has labeled the conduct of Central Gulf actionable as to this seaman contrary to the Fifth Circuit decision which had already characterized such conduct by the same shipowner as completely proper, is a denial of due process of law to the defendant.

CONCLUSION

For the above reasons, a writ of certiorari should be issued to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

WALTER A. DARBY, JR.,
Counsel for Petitioner,
26 Broadway,
New York, N. Y. 10004.

Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 498—September Term, 1970.

(Argued March 11, 1971 Decided April 26, 1971.)

No. 33545

EUGENE J. SAMMON,

Plaintiff-Appellant,

—v.—

CENTRAL GULF STEAMSHIP CORPORATION,

Defendant-Appellee.

Before:

HAYS and FEINBERG, *Circuit Judges,*
and CURTIN, *District Judge.**

Appeal from a decision and order of the United States District Court for the Southern District of New York, John M. Cannella, *Judge,* denying maintenance and cure benefits to plaintiff, a merchant seaman.

Reversed.

* Of the United States District Court for the Western District of New York, sitting by designation.

EDWARD M. KATZ, New York, N. Y. (Abraham E. Freedman, New York, N. Y., on the brief), *for Plaintiff-Appellant.*

WALTER A. DARBY, JR., New York, N. Y. (Foley, Grainger & Darby, New York, N. Y., on the brief), *for Defendant-Appellee.*

HAYS, *Circuit Judge:*

In October, 1964 plaintiff was referred for employment aboard defendant's vessel, the S.S. "Green Port." Before he was accepted, plaintiff was required to submit to a pre-sign-on physical examination by the defendant's physician. In the course of this examination, plaintiff reported, in response to a question concerning any earlier accident, injury or illness, that he had had tuberculosis in 1950. He did not, however, reveal that he once received medical attention for warts on the sole of his right foot. The defendant's physician X-rayed plaintiff's chest and found him unfit for duty solely on the basis of suspected tuberculosis. Plaintiff, pursuing his rights under his union's collective bargaining agreement, obtained another physical examination from the United States Public Health Service Outpatient Clinic in New York City. Since he was found fit for duty he was given employment on defendant's vessel.

While plaintiff was serving aboard the "Green Port" from October 9, 1964 to January 29, 1965, a period of 112 days, there was no recurrence of tuberculosis; but one week before the end of the voltage, a wart developed on the sole of plaintiff's right foot. Plaintiff obtained a master's certificate from the "Green Port's" chief officer in order to be entitled to medical treatment for the wart. He left the vessel and was treated from February 25, 1965 to August 9, 1965 at the United States Public Health Service Hospital, Staten Island, New York. During this period plain-

tiff was certified as not fit for duty, and he sought payment of maintenance and cure from the defendant. Upon defendant's refusal to pay, plaintiff initiated this action in the United States District Court for the Southern District of New York. The district court denied the claim for maintenance and cure on the ground that plaintiff failed to disclose to defendant's examining physician his earlier difficulties with and treatment for a wart on the sole of his right foot.[1] For the reasons hereafter set forth we reverse and remand to the district court to fix the amount to be awarded for maintenance and cure, interest, costs, and counsel fees.

In finding for the defendant, the district court said that a "seaman should provide truthful and complete answers to questions concerning his medical background . . ." and that "concealment of material medical data prevents entitlement to an award of maintenance and cure. . . ." 305 F. Supp. 1071, 1073 (S.D.N.Y. 1969). As authority, *McCorpen* v. *Central Gulf Steamship Corp.*, 396 F.2d 547 (5th Cir.), cert. denied, 393 U.S. 894 (1968) was cited. The rule of the *McCorpen* case, that *any* concealment of material medical data, prevents an award for maintenance and cure, is not the rule of this Circuit. In *Ahmed* v. *United States*, 177 F.2d 898, 900 (2d Cir. 1949), this court held that a seaman "who believes himself fit for duty and signs on without any fraudulent concealment, is entitled to maintenance and cure, notwithstanding a previous condition of ill health." The concealment of a previous condition is fraudulent only if the seaman knows or reasonably should know that the concealed condition is relevant.

The record here contains no evidence whatsoever that the plaintiff deliberately suppressed anything which he knew to be relevant. Plaintiff readily revealed his earlier tubercular condition, although that revelation all but cost

---

[1] The district court opinion is reported at 305 F. Supp. 1071 (S.D.N.Y. 1969).

him his job on the "Green Port." Plaintiff testified without contradiction that on the date he joined defendant's vessel, he felt well and believed himself fully capable of performing his duties. There is no evidence to indicate that he was not in excellent health for the first 109 days of the 112 days which he spent aboard defendant's vessel. The defendant failed to discharge his burden of demonstrating the falsity of plaintiff's testimony that he reasonably believed himself fit for duty at the time he joined defendant's vessel. See *Burkert* v. *Weyerhaeuser Steamship Co.*, 350 F.2d 826, 831 (9th Cir. 1965). Nothing in the evidence establishes that plaintiff did not in good faith believe himself fit for duty. An honest failure to disclose his prior condition will not defeat his claim. *Ahmed* v. *United States, supra; Burkert* v. *Weyerhaeuser Steamship Co., supra; Diaz* v. *Gulf Oil Corp.*, 237 F. Supp. 261, 263 (S.D.N.Y. 1965) (Feinberg, *J.*).

Reversed and remanded.

Opinion.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 AD: 15

#35613

EUGENE J. SAMMON,

Plaintiff,

against

CENTRAL GULF STEAMSHIP CORPORATION,

Defendant.

CANNELLA, J.

Action by plaintiff, a merchant seaman, to recover maintenance and cure benefits, pre-judgment interest on any recovery, and counsel fees incurred in his action against defendant shipowner. Judgment for the defendant.

The Court has jurisdiction since the claim is the traditional maintenance and cure action of a seaman under the general Maritime Law.

The parties have essentially stipulated the facts in this case.[1] The Court finds that plaintiff was employed by defendant on the vessel "S.S. Green Port" from October 23, 1964 to January 29, 1965, and that on January 26,

[1] Pre-trial order, dated August 28, 1967.

1965, plaintiff obtained a Master's Certificate relating to a planter's wart on the sole of his right foot. Upon discharge from the vessel on January 29, 1965, plaintiff reported to U. S. Public Health Service Hospital, Staten Island, N. Y. for treatment on February 3, 1965, at which time he was marked "fit for duty" and an appointment was made for February 25, 1965. From February 25, 1965 to August 9, 1965 plaintiff was not "fit for duty" because of the wart on the sole of his right foot. No maintenance was paid for this period. The standard industry rate of maintenance at the time was $8.00 per day.

In addition the Court finds that the plaintiff had been a merchant seaman since 1944 and his work record indicates that in 1963 while employed on the Attleboro, he had warts on his right foot and was treated in U. S. Public Health Service Hospital on Staten Island from May 28, 1963 to December 27, 1963, when he was marked "fit for duty". Hospital records note "no evidence of recurring wart tissue . . . Return after one trip—will call." From January 16, 1964 to February 25, 1964, plaintiff was employed by Moore McCormack on the Argentina, from March 24, 1964 to May 4, 1964 by Grace Lines on the Santa Rita; from May 7, 1964 to June 23, 1964 by Moore McCormack on the Mormac Rio; from September 8, 1964 to September 24, 1964 on a United Fruit Line ship. He left this ship in New Orleans and came to New York by plane. Plaintiff then signed on the defendant's vessel on October 9, 1964. While on the Argentina he obtained a Master's Certificate for the same condition complained of herein. While on the Mormac Rio, toward the end of the voyage, the warts on his right foot troubled him and he obtained a Master's Certificate, after which he went to the U. S. Public Health Service Hospital at Staten Island and received treatment for eight days.

There is no question that the plantar wart condition afflicting the plaintiff was recurrent. There is similarly no dispute that an able bodied seamon cannot perform his

duties properly when he has this condition. Although the plaintiff revealed his prior tuberculosis condition at a pre-sign on physical examination, he did not see fit to reveal his prior recurrent plantar wart condition as part of his past medical history. This he had an obligation to do.[2] The test in this case is not merely whether the seaman reasonably expected that his prior condition was one of importance to the shipowner, that is, whether he felt he could reasonably perform his duties. Rather it is that the seaman should provide truthful and complete answers to questions concerning his medical background to give his potential employer an opportunity to study his history and make a judgment as to whether or not he should employ him.[3] The concealment of material medical data prevents entitlement to an award of maintenance and cure for this condition since the causal link to the existing disability is present. No valid contract for employment existed between the parties for this voyage.[4]

The test of full disclosure does not work a great hardship on the plaintiff since he clearly has the right to appeal a company doctor's decision to the U. S. Public Health Service. In fact in this case he did just that as far as his prior tuberculosis condition was concerned and the U. S. Public Health Service doctor overruled the company doctor. It might well be that they would have similarly overruled an adverse finding by the company doctor on the wart condition, if it was called to the company doctor's attention. The company lost a valuable right, due to what the Court finds to be a willful failure to disclose a condi-

---

[2] *Mansi* v. *Isthmian Lines, Inc.*, 1965 A.M.C. 1902 (S.D.N.Y. 1965); *Zackey* v. *American Export Lines, Inc.*, 152 F. Supp. 772 (S.D.N.Y. 1957).

[3] *See McCorpen* v. *Central Gulf Steamship Corp.*, 396 F.2d 547 (5th Cir. 1968).

[4] *See Mansi* v. *Isthmian Lines, Inc., supra.*

tion material to his ability to perform his duties as an able bodied seaman.

Judgment for defendant.[5]

So ordered.

Dated: New York, N. Y.
February 14, 1969

JOHN M. CANNELLA,
U.S.D.J.

[5] The questions of pre-judgment interest and attorneys' fees are rendered moot by the decision of the Court.

Supreme Court, U.S.
FILED
SEP 18 1971

IN THE

Supreme Court of the United States

October Term, 1971.

No. 120. 71-120

EUGENE SAMMON,

Respondent,

v.

CENTRAL GULF STEAMSHIP CORPORATION,

Petitioner.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

ABRAHAM E. FREEDMAN,
EDWARD M. KATZ,
36 Seventh Avenue,
New York, N. Y. 10011
Counsel for Respondent.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

INDEX TO BRIEF

	Page
OPINIONS OF THE COURTS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	2
COUNTER STATEMENT OF THE CASE	3
REASONS WHY A WRIT SHOULD BE DENIED	6
I. The Decision Below, Which Involves a Clearly Settled Principle, Is Supported by the Decisions of the Supreme Court in Calmar Steamship Corp. v. Taylor, 303 U. S. 525; Aguilar v. Standard Oil Co., 318 U. S. 724; and Farrell v. U. S., 336 U. S. 511 and by the Decisions of Courts of Appeals	6
II. The Direction to Award Counsel Fees, Interest and Costs Is in Accordance With This Court's Decision in Vaughan v. Atkinson, 369 U. S. 527, 8 L. ed. 2d 88 (1962)	12
CONCLUSION	13

TABLE OF CASES CITED.

	Page
Ahmed v. United States, 177 F. 2d 898 (2d Cir., 1949)	5, 7, 9, 10, 11, 12
Aguilar v. Standard Oil Co., 318 U. S. 724, 87 L. ed. 1107 (1943)	7
Burkert v. Weyerhaeuser S. S. Co., 350 F. 2d 826 (9 Cir., 1965)	10
Calmar Steamship Corporation v. Taylor, 303 U. S. 525, 82 L. ed. 993 (1938)	6
Chelentis v. Luckenbach S. S. Co., 247 U. S. 372, 62 L. ed. 1171 (1917)	6
Cortes v. Baltimore Insular Line, 287 U. S. 367, 77 L. ed. 368 (1932)	6
Couts v. Erickson, 241 F. 2d 499 (5 Cir., 1957)	10
Dragick v. Strika, 309 F. 2d 161 (9 Cir., 1962)	10
Farrell v. U. S., 336 U. S. 511, 93 L. ed. 850 (1949)	7
Gore v. Clearwater Shipping Corp., 378 F. 2d 584 (3d Cir., 1967)	10
Gypsum Carrier, Inc. v. Handelsman, 307 F. 2d 525 (9 Cir., 1962)	10
Harden v. Gordon, 11 Fed. Cas. 480, Case No. 6,047 (C. C. D. Mass., 1823)	6
Lindquist v. Dilkes, 127 F. 2d 21 (1942)	8
McCorpen v. Central Gulf Steamship Corp., 396 F. 2d 547 (5th C. A. 1968)	9, 12
Newton v. Gulf Oil Corp., 180 F. 2d 491 (3 Cir., 1950)	10
Pacific S. S. Co. v. Peterson, 278 U. S. 130, 73 L. ed. 220 (1928)	6
Reed v. Canfield, 20 Fed. Cas. 426, Case No. 11,641 (C. C. D. Mass. 1832)	6
Rosenquist v. Isthmian S. S. Co., 205 F. 2d 486 (2 Cir. 1953)	10
Sobosle v. United States Steel Corp., 359 F. 2d 7 (3rd Cir., 1966)	10
The Osceola, 189 U. S. 158, 47 L. ed. 760 (1903)	6
Vaughan v. Atkinson, 369 U. S. 527, 8 L. ed. 2d 88 (1962)	12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 120.

EUGENE SAMMON,

Respondent,

v.

CENTRAL GULF STEAMSHIP CORPORATION,

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, Eugene Sammon, respectfully prays that Petitioner's application for a Writ of Certiorari to review the final judgment of the United States Court of Appeals for the Second Circuit, entered on April 26, 1971 be denied.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court for the Southern District of New York is reported at 305 F. Supp. 1071 (S. D. N. Y. 1969), and is reproduced in the Petition, pages 9-12. The opinion of the Court of Appeals is not yet reported, but is set forth in the Petition, pages 13-16.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition at page 2.

QUESTIONS PRESENTED.

1. Where the uncontradicted evidence showed that prior to employment aboard a vessel, a merchant seaman had been certified fit for duty by the United States Public Health Service Hospital and honestly believed himself to be fully able to work; and that thereafter the seaman worked aboard the vessel without difficulty for three and a half months, after which period he became disabled by reason of a wart on his foot; may a shipowner deny maintenance and cure benefits to him on the ground that during his pre-employment physical examination he had not disclosed his previous treatment for a previous wart?

2. Where a shipowner refused to respond to repeated requests for payment of maintenance and cure benefits, thereby forcing a seaman to retain counsel and bring suit for the maintenance and cure due him, was not the Court of Appeals correct in ruling that he was entitled to recover interest, costs, and counsel fees in addition to the maintenance that was due?

STATUTES INVOLVED.

The statutes involved are set forth in the Petition at page 3.

COUNTER STATEMENT OF THE CASE.

On October 9, 1964, respondent, a merchant seaman, was referred by his union for employment aboard petitioner's vessel, the S. S. "Green Port" (A-14).* Prior to joining the vessel he underwent a pre-employment physical examination by the petitioner's doctor (A-14-18, 46). This physician inquired of respondent whether he had had any prior accident, injury or illness (A-46-47). Respondent replied that he had had tuberculosis in 1950 (A-47). A chest x-ray was taken and the doctor rejected respondent for employment on the ground of suspected tuberculosis (A-70). Pursuant to the provisions of his union collective bargaining agreement, respondent immediately went to a United States Public Health Service facility to be examined with respect to his fitness for duty.[1] The Public Health Service physician after examination certified respondent as being fit for duty following which he was accepted for employment by petitioner (A-14).

Respondent joined the "Green Port" immediately on October 9, 1964 and worked without difficulty for three and a half months to January 29, 1965 (A-14, 18). Near the end of the second voyage he began having difficulty with a plantar wart on his right foot (A-18). He, therefore, obtained a master's certificate enabling him to receive medical treatment ashore through the United States Public Health Service Hospital at Staten Island, New York, where he was treated on an outpatient basis from February 3, 1965 until

---

* All page references are to the Joint Appendix on Appeal to the United States Court of Appeals for the Second Circuit unless otherwise indicated.

1. The collective bargaining agreement between the National Maritime Union and the petitioner provided that in a case of a dispute over a seaman's fitness for duty, the seaman may be examined by the U. S. Public Health Service whose decision on fitness for duty shall be final and binding.

August 9, 1965 (A-20-22). While under treatment at the Staten Island Hospital, respondent was issued unfit for duty status certificates by the hospital. He submitted these unfit for duty certificates to petitioner's New York agent and requested the payment of maintenance and cure benefits (A-22-23). Despite these numerous requests, petitioner not only refused to pay the maintenance, but even neglected to make any response to his requests (A-23). The fact of the matter is that petitioner never gave any reason to respondent for its refusal to pay the maintenance due him.

Confronted with this refusal to pay maintenance, respondent was forced to retain counsel and institute suit to recover the maintenance due him. Even then the petitioner made no effort to explain its failure to pay maintenance. When the case was finally reached for trial, petitioner's counsel took the position, after discovery, that the refusal to pay maintenance was based upon respondent's failure to advise the physician at the pre-employment examination of his prior treatment for a wart on the sole of his right foot. It was never denied that respondent had been treated for a wart on his right foot (A-23-30, 31-35). However, respondent testified and the medical records confirmed that he had been declared fit for duty for several months prior to his employment on petitioner's vessel and had been completely asymptomatic since his discharge from the hospital (A-23, 28).[2]

Respondent testified at the trial that at the time he joined the "Green Port" he believed himself to be fit for duty and fully able to perform his work (A-30). This testimony was uncontradicted. The District Court made no finding that respondent either intentionally or fraudulently concealed the fact that he had had a wart prior to

2. Even if petitioner had rejected respondent because of the prior wart, respondent would nevertheless have had to be employed because of his fit for duty certificate from the Public Health Service.

his service on the vessel. Nor did the District Court find that respondent was in fact not fit for duty or that respondent had reason to believe that he was not fit for duty at the time he accepted employment. However, notwithstanding the absence of such findings, the District Court held that maintenance was not payable, solely because respondent had not revealed his prior treatment for the wart (Petition, pp. 15-16).

On appeal, the Court of Appeals for the Second Circuit reversed. The Court, following its prior decision in *Ahmed v. United States*, 177 F. 2d 898 (2nd Cir. 1949), held that only a "fraudulent concealment" would deprive a seaman of his right to receive maintenance and cure benefits and that ". . . the concealment of a previous condition is fraudulent *only if the seaman knows or reasonably should know that the concealed condition is relevant* . . ." (Emphasis supplied) (Petition, page 11). The Court also found that there was ". . . no evidence whatsoever that the plaintiff deliberately suppressed anything that he knew to be relevant." The Court of Appeals, therefore, remanded the case to the District Court with instructions to determine the amount to be awarded for maintenance and cure, plus interest, costs, and counsel fees (Petition, page 11).

REASONS WHY A WRIT SHOULD BE DENIED.

I. The Decision Below, Which Involves a Clearly Settled Principle, Is Supported by the Decisions of the Supreme Court in Calmar Steamship Corp. v. Taylor, 303 U. S. 525; Aguilar v. Standard Oil Co., 318 U. S. 724; and Farrell v. U. S., 336 U. S. 511 and by the Decisions of Courts of Appeals.

This Court has consistently recognized, confirmed and applied "the ancient duty of a vessel and her owner to provide maintenance and cure for seamen injured or falling ill while in service" of the vessel. *Calmar Steamship Corporation v. Taylor*, 303 U. S. 525, 527, 82 L. ed. 993, 996 (1938).[3] In *Calmar*, this Court emphasized that this obligation "arises from the contract of employment . . . ; does not rest upon negligence or culpability on the part of the owner or master, . . . nor is it restricted to those cases where the seaman's employment is the cause of the injury or illness." U. S. at 527, L. ed. at 996. Mr. Justice Stone, explaining the strong policy considerations behind maintenance and cure, reiterated the reasons underlying the rule as enumerated by Mr. Justice Story, in *Harden v. Gordon*, 11 Fed. Cas. 480, Case No. 6,047 (C. C. D. Mass., 1823), demonstrating its humanitarian and economic importance

3. After early recognition by Justice Story in *Harden v. Gordon*, 11 Fed. Cas. 480, Case No. 6,047 (C. C. D. Mass. 1823), and in *Reed v. Canfield*, 20 Fed. Cas. 426, Case No. 11,641 (C. C. D. Mass. 1832), this Court specifically confirmed the importance of maintenance and cure in American maritime law in *The Osceola*, 189 U. S. 158, 175, 47 L. ed. 760, 764 (1903); and has since emphasized the strong humanitarian and economic policy which it implements. *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372, 62 L. ed. 1171 (1917); *Pacific S. S. Co. v. Peterson*, 278 U. S. 130, 73 L. ed. 220 (1928); *Cortes v. Baltimore Insular Line*, 287 U. S. 367, 371, 77 L. ed. 368, 371 (1932).

to the seaman and the shipowner, as well as its essential position in the commercial and defense interests of this nation, U. S. at 528, L. ed. at 997, and emphasized "the liberality with which admiralty courts have traditionally interpreted rules devised for the benefit and protection of seamen who are its wards", U. S. at 529, L. ed. at 997.

Consequent upon these considerations, this Court has held that neither negligence on the part of the seamen nor other acts not amounting to gross misconduct will relieve the shipowner of his duty to supply maintenance and cure. *Aguilar v. Standard Oil Co.*, 318 U. S. 724, 730-31, 87 L. ed. 1107, 1113 (1943). So absolute and all pervading is the obligation to provide maintenance that the seaman's right to maintenance can be forfeited only when his injury or disability results from his own "wilful misbehavior". In *Farrell v. U. S.*, 336 U. S. 511, 516, 93 L. ed. 850, 854 (1949), this Court said that "it has been the merit of the seaman's right to maintenance and cure that it is so inclusive as to be relatively simple, and can be understood and administered without technical considerations . . ."; that "it has few exceptions or conditions to stir contentions, cause delays, and invite litigations . . ;" that "the seaman could forfeit the right only by conduct whose wrongful quality even simple men of the calling would recognize—insubordination, disobedience to orders, and gross misconduct."

In *Ahmed v. United States*, 177 F. 2d 898 (2d Cir., 1949), the Second Circuit, in line with the foregoing precedents, and reflecting this Court's distaste for technical defenses asserted against maintenance claims, strongly rejected a shipowner's argument that a seaman who failed to call a quiescent tubercular condition to the attention of the company doctor at a pre-employment physical examination thereby forfeited his right to maintenance when this condition became aggravated during his subsequent serv-

ice aboard the vessel. Judge Swan, noting the absence of authority for such a proposition, said (900):

> ". . . On the contrary, long ago it was held that a seaman who believes himself fit for duty and signs on without any fraudulent concealment, is entitled to maintenance and cure, notwithstanding a previous condition of ill health. Neilson v. The Laura, 17 Fed. Cas. page 1305, No. 10,092 . . ."

Further, referring to the fact that the shipowner there had taken its own medical examination of the seaman before signing him on, as happened in the instant case, the Court continued (900):

> ". . . When a shipowner undertakes by a physician's examination to satisfy himself as to the fitness of a prospective member of the crew, we think that such examination should be proof of the seaman's condition unless he conceals something which he knows to be relevant or which he can reasonably be charged with so knowing. . . ."

In the above case, Judge Swan cited the decision of the Third Circuit in *Lindquist v. Dilkes*, 127 F. 2d 21 (1942), where the seaman failed to disclose at the time of signing on that he then had a prostate-enlargement of long duration, which caused pain and discomfort but did not interfere with his job. The condition became progressively worse, so that he soon became unable to work, and eventually required surgery. In affirming the award of maintenance and cure to the seaman, the Court of Appeals for the Third Circuit agreed with the conclusion that the seaman's failure to disclose a previous condition, even if still existing at the time he signed on, did not bar his maintenance claim, if

there was nothing to indicate to the seaman that he had a condition that might become disabling.

Petitioner relies exclusively on the case of *McCorpen v. Central Gulf Steamship Corp.*, 396 F. 2d 547 (5th Cir., 1968), but an examination of that case reveals that petitioner's reliance on that case is clearly misplaced. In *McCorpen,* the seaman had a thirteen year history of diabetes which, at the time he signed on, required daily insulin shots and strict dietary control. The Fifth Circuit felt that these were *material* medical facts, which should have been disclosed when examined by the shipowner's physician. In expressing the principle thus involved, the Fifth Circuit specifically cited the Second Circuit's *Ahmed* case as a basis therefor (549). The point emphasized by the Court was that the seaman had been guilty of "the kind of intentional concealment of a disabling illness" that bars maintenance (549). This was not a departure from, but an application of, the principle expressed by the Second Circuit.[4]

The factual situation in *McCorpen* is substantially different from failure to state the existence of a wart which had disappeared as in the instant case. Here, respondent had a wart on the sole of his right foot which, while it previously required medical attention, had disappeared. At the time respondent signed on petitioner's vessel, he had had no difficulty whatsoever for the three preceding months, was not under a doctor's care, and was not required to follow any daily regimen. The Second Circuit held that "the

4. The dissent by Judge Rives makes it clear that the issue here was not one of legal principle, but of factual evaluation. He said that "I do not think that the evidence supports a finding that *McCorpen* intentionally concealed a disabling illness." (551). His disagreement with the majority was as to the evaluation of the evidence. There was no dispute as to the principle to be applied, as there is no dispute between the majority and the Second Circuit.

record here contains no evidence whatsoever that the plaintiff deliberately suppressed anything which he knew to be relevant." These essential factual distinctions between the two cases demonstrate an agreement between the Circuits in legal principle, and its application to two different factual situations.

In an effort to distinguish *Ahmed,* petitioner here argues that that decision turned upon the seaman's inability to understand English. However, *Ahmed* has never been so limited, nor so narrowly applied. Indeed, in *Rosenquist v. Isthmian S. S. Co.*, 205 F. 2d 486, 489 (2 Cir. 1953), the same Court, in an opinion by the same Judge, applied *Ahmed* as it did in this case, without any reference to language difficulty. Similarly, in the Third Circuit, in *Newton v. Gulf Oil Corp.*, 180 F. 2d 491, 493, and n. 3 (3 Cir., 1950) Judge Goodrich cited *Ahmed* for its broad and liberal principle as example of the proposition that ". . . the protection of the seaman as a ward of the admiralty is by no means an obsolete concept in the law. . . ." In *Couts v. Erickson,* 241 F. 2d 499, 502 (5 Cir., 1957), the Fifth Circuit similarly cites *Ahmed,* for its broad statement on "purposeful, conscious concealment." In *Burkert v. Weyerhaeuser S. S. Co.,* 350 F. 2d 826, 829-30 (9 Cir., 1965), the Ninth Circuit cited *Ahmed* as support for the broad proposition that a seaman having "a good faith belief that he is reasonably fit for duty . . . is entitled to maintenance and cure and is not precluded from relief for failing to voluntarily disclose any illness or disease, whether existing or pre-existing."[5] Similarly, *Gypsum Carrier, Inc. v. Handelsman,* 307 F. 2d 525, 531 (9 Cir., 1962); *Dragick v. Strika,* 309 F. 2d 161, 163 (9 Cir., 1962).[6]

---

5. The Ninth Circuit Court discussed and quoted from *Ahmed* at length (p. 830) without reference to language difficulty.

6. As to the principle, see also *Sobosle v. United States Steel Corp.*, 359 F. 2d 7 (3rd Cir., 1966), and *Gore v. Clearwater Shipping Corp.*, 378 F. 2d 584 (3rd Cir., 1967).

The facts in this case clearly fall within the rule expressed by this Court and as applied in *Ahmed*. The argument raised here by petitioner is the same as was rejected in *Ahmed:* that the seaman has a duty to disclose a prior condition, despite the fact that it is quiescent and without symptoms and does not disable him from performing his duties. Respondent had been certified by the U. S. Public Health Service as "fit for duty", with reference to his prior wart. It is uncontradicted that at the time he joined the petitioner's vessel he honestly believed himself fully able to work, a belief borne out by the fact that he had worked without difficulty for three and a half months thereafter.

Further, it must be noted that even if respondent had been rejected by the company for employment because of the prior existence of a wart, the seaman had the right to appeal to the U. S. Public Health Service. That service had found him fit for duty as to the prior wart, and such finding would have been final and binding, and the company would have had to accept him for employment despite any attempt to reject him.

Under these circumstances, respondent's failure to disclose the fact that he had previously had a wart on his foot cannot be considered an act of "fraud" or "wilful misconduct" as would warrant denial of maintenance. Thus, the decision below is fully consistent with the broad policy considerations and applied principles announced by this Court, and with the prior decisions of the Court below in *Ahmed* and of the other Circuits. This case does not involve any "new" principle of law; rather, it represents a proper application of principles which are as old as the law of maintenance and cure itself, and which were specifically recognized in the context of pre-employment physical examinations in the *Ahmed* case.

II. The Direction to Award Counsel Fees, Interest and Costs Is in Accordance With This Court's Decision in Vaughan v. Atkinson, 369 U. S. 527, 8 L. ed. 2d 88 (1962).

In *Vaughan v. Atkinson,* 369 U. S. 527, 8 L. ed. 2d 88 (1962), this Court held that counsel fees, interest and costs may be awarded where maintenance has been wrongfully denied and the seaman was required to retain counsel and to institute suit to recover the maintenance. Notwithstanding this broad authority for awarding counsel fees, interest and costs in *Vaughan v. Atkinson, supra,* petitioner now argues that certiorari should be granted in the instant case because its refusal to pay maintenance was "not arbitrary". But, petitioner's rationale does not shield it from the policy expressed in *Vaughan.*

Petitioner argues that it had the right to rely on the Fifth Circuit's decision in *McCorpen v. Central Gulf Steamship Corp., supra,* and thereby refuse to pay maintenance. But, as we have previously demonstrated, the decision in *McCorpen* is factually distinguishable from the instant case. Moreover, petitioner could not have relied on *McCorpen* because that case was not decided until 1968, more than three years *after* petitioner refused the request for maintenance in the instant case. The only explanation for its refusal was pure recalcitrance. Further, the instant suit was instituted in the Second Circuit where *Ahmed v. United States, supra,* had been the law for over 20 years. It is, therefore, apparent that petitioner's actions were arbitrary and unjustified.

In *Vaughan,* this Court reiterated the oft-stated principles that the duty to provide maintenance and cure must be interpreted liberally "for the benefit and protection of seamen who are its wards"; that the shipowner's liability for maintenance and cure was among "the most pervasive"

of all, and "was not to be defeated by restrictive distinctions" nor "narrowly confined"; that "when there are ambiguities or doubts, they are resolved in favor of the seaman." (U. S. at 532-33, L. ed. at 92).

Under the principles expressed by this Court, the Court below did properly award counsel fees, interest and costs.

CONCLUSION.

For the above foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
EDWARD M. KATZ,
Counsel for Respondent.